TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 132.

ALBERT S. APSEY, RECEIVER OF THE FIRST NATIONAL BANK OF CHELSEA, PLAINTIFF IN ERROR,

vs.

GEORGE E. KIMBALL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED JANUARY 14, 1909.

(21,473.)

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a *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[Seal United States Circuit Court of Appeals, First Circuit.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between George E. Kimball, plaintiff in error, and Albert S. Apsey, Receiver, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of December, in the year of our Lord one thousand nine hundred and eight.

CHARLES K. DARLING,
Clerk of the United States Circuit Court of Appeals for the First Circuit.

Allowed by
LE BARON B. COLT,
Senior Circuit Judge, First Judicial Circuit.

b *Return on Writ of Error of United States Circuit Court of Appeals for the First Circuit.*

United States Circuit Court of Appeals for the First Circuit.

And now, here, the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith, under seal of the said United States Circuit Court of Appeals a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Charles K. Darling, Clerk of said United States Circuit Court of Appeals for the First Circuit, have hereto

set my hand and the seal of said Court at Boston, in the First Judicial Circuit, this eighteenth day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, First Circuit.]

CHARLES K. DARLING, *Clerk*.

c United States Circuit Court of Appeals for the First Circuit, October Term, 1907.

No. 780.

GEORGE E. KIMBALL, Defendant, Plaintiff in Error,

v.

ALBERT S. APSEY, Receiver, Plaintiff, Defendant in Error.

Error to the Circuit Court of the United States for the District of Massachusetts.

Judgment in Circuit Court (Dodge, J.), May 26, 1908.

Certified Copy of Record and all Proceedings in said Cause to and Including December 18, 1908.

d United States Circuit Court of Appeals for the First Circuit, October Term, 1907.

No. 780.

GEORGE E. KIMBALL, Defendant, Plaintiff in Error,

v.

ALBERT S. APSEY, Receiver, Plaintiff, Defendant in Error.

Error to the Circuit Court of the United States for the District of Massachusetts.

Judgment in Circuit Court (Dodge, J.), May 26, 1908.

Record.

Wilbur H. Powers, for Defendant, Plaintiff in Error.
George L. Wilson, for Plaintiff, Defendant in Error.

Boston:
Printed under Direction of the Clerk.
1908.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1907.

No. 780.

GEORGE E. KIMBALL, Defendant, Plaintiff in Error,
v.
ALBERT S. APSEY, Receiver, Plaintiff, Defendant in Error.

Writ of Error.

[L. S.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Albert S. Apsey, Receiver of the First National Bank of Chelsea, having a usual place of business at Boston, State of Massachusetts, plaintiff, and George E. Kimball, of Boston, in the county of Suffolk, within the District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the third day of July next, in the said
2 Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of June, in the year of our Lord one thousand nine hundred and eight.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by
FREDERIC DODGE,
U. S. District Judge.

Return of Circuit Court on Writ of Error.

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judges of the Circuit Court of the United States, in and for the District of Massachusetts, make return of

this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Alex. H. Trowbridge, Clerk of said Circuit Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this third day of July, A. D. 1908.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

3 *Transcript of Record of Circuit Court.*

[Filed in Circuit Court of Appeals July 3, 1908.]

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, Begun and Holden at Boston, within and for the District of Massachusetts, on the Last Tuesday of February, Being the Twenty-fifth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Eight.

Before the Honorable Frederic Dodge, District Judge.

No. 273. Law Docket.

ALBERT S. APSEY, Receiver, Plaintiff,
v.
GEORGE E. KIMBALL, et-., Trustee, Defendant.

The Writ and Declaration in this cause were filed in the clerk's office on the fifteenth day of March, A. D. 1907, and are in the words and figures following:

Writ.

[L. S.]

UNITED STATES OF AMERICA,
Massachusetts District, ss:

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods and estate of George E. Kimball, of Boston, in the county of Suffolk, within said district, defendant, to the value of six thousand dollars, and summon the said defendant (if he may be found in your district) to appear before our justices of our Circuit Court, next to be holden at Boston, within and for our District of Massachusetts, on the third Tuesday of October next; then and there in our said court to answer unto Albert S. Apsey, receiver of the First National Bank of Chelsea, hav-

ing a usual place of business at said Boston, plaintiff, in an action of contract, to the damage of the said plaintiff (as he says) the
4 sum of six thousand dollars, which shall then and there be made to appear, with other due damages. And whereas the said plaintiff says that the said defendant has not in his own hands and possession goods and estate to the value of six thousand dollars aforesaid, which can be come at to be attached, but has entrusted to and deposited in the hands and possession of International Trust Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, having a usual place of business at said Boston, trustee of the said defendant, goods, effects, and credits to the said value. We command you, therefore, that you summon the said International Trust Company (if it may be found in your district) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against his goods, effects, or credits, in the hands and possession of it, the said trustee, and have you there this writ, with your doings therein.

Witness, the Honorable Melville W. Fuller, at Boston, the fifth day of March, in the year of our Lord one thousand nine hundred and seven.

ALEX. H. TROWBRIDGE, *Clerk*,
By L. F. TUCKER, *Deputy Clerk*.

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *March* 6, 1907.

Pursuant hereunto, I have this day, at ten o'clock A. M., attached all real estate and all right, title and interest in any and all real estate in the city of Boston and elsewhere in the county of Suffolk and said district belonging to the within-named George E. Kimball, defendant, and I have given to the Register of Deeds for the county of Suffolk, at Boston, a true and attested copy of this my writ without the declaration, and so much of my return indorsed thereon as relates to the attachment of real estate; and on the same day, at two o'clock and forty minutes P. M., I summoned the within-named International Trust Company, trustee, at Boston, to appear at court and answer as herein directed by giving to Henry L. Jewett, secretary of said International Trust Company, a true and attested copy of this writ in hand, at Boston; and afterwards, on the same day, I summoned the within-named defendant, George E. Kimball, to appear at court and answer as herein directed by giving to him in
5 hand at 128 Pembroke Street, Boston, a true and attested copy of this writ.

JAMES C. RUHL,
Deputy U. S. Marshal.

Fees.

Service	$6 00
Copies	1 20
Travel	18
Recording	25
	$7 63

Declaration.

[Filed March 15, 1907.]

And the plaintiff says that he was, on the twenty-fifth day of August, 1906, duly appointed by the Comptroller of the Currency of the United States of America receiver of the First National Bank of Chelsea, a corporation organized under the banking laws of the United States, and having its usual place of business at Chelsea, in the county of Suffolk, within said district, and that immediately after said appointment, under the direction of the Comptroller, he took possession of the books, papers, and assets of every description belonging to said bank, and still has the same in his possession, and has title in and to the same and all of the same. And the plaintiff further says that the defendant was and is a stockholder in said bank, and held forty shares of its capital stock of the par value of $100 per share; that the Comptroller of the Currency of the United States of America, in pursuance of the authority vested in him by law, made an assessment upon the shareholders of said bank of one hundred per cent of the par value of the amount of stock held by them respectively, and the amount of the defendant's liability under said assessment was and is $4000, and notice of said assessment and of said liability was sent to the defendant by the plaintiff on or about the twenty-fifth day of September, 1906, and the defendant has not paid the same.

Wherefore the defendant owes the plaintiff the amount of said assessment, $4000, with interest thereon from said twenty-fifth day of September, 1906.

By His Attorney, GEORGE L. WILSON.

6 Upon the filing of the writ and declaration, an order to plea was entered.

On the nineteenth day of March, A. D. 1907, the following Trustee's Answer was filed:

Trustee's Answer.

[Filed March 19, 1907.]

And now, Henry L. Jewett, secretary of and in behalf of the International Trust Company, summoned as trustee of the principal defendant in the above-entitled action, appears and makes answer that, at the time of the service of the plaintiff's writ upon him, he had not

in his hands or possession any goods, effects or credits of said defendant, and of this he submits himself to examination upon his oath.

Wherefore he prays that he may be discharged, and for his costs.

HENRY L. JEWETT, *Secretary.*

MARCH 16, 1907.

Then the above-named Henry L. Jewett made oath that the foregoing answer subscribed me him is true.

Before me,

LEWIS PINIO,
Justice of the Peace.

On the fifteenth day of April, A. D. 1907, the following Answer was filed:

Answer.

[Filed April 15, 1907.]

And now comes the defendant in the above-entitled action, and for answer denies each and every allegation, item and particular in the plaintiff's writ and declaration contained.

And further answering, the defendant especially denies that he is or ever was a stockholder in the First National Bank of Chelsea, the banking association mentioned in the plaintiff's declaration, and the defendant denies that he now holds or ever held forty shares or any shares of the capital stock of said banking association. And the defendant denies that he owes the plaintiff the sum of four thousand dollars, and denies that he owes the plaintiff anything.

7 And further answering, the defendant says that on September 5, 1904, and for several years previous thereto, he was the owner and holder of forty (40) shares of the capital stock of the "First National Bank of Chelsea, Massachusetts," a banking association and corporation organized under the laws of the United States of America, whose charter expired on the fifth day of September, 1904. And the defendant says that a new banking association under a new charter was formed on September 6, 1904, under the name of "First National Bank of Chelsea," and the said "First National Bank of Chelsea" under the authority of its new charter and as a distinct and separate association did a banking business subsequent to September 5, 1904, and up to and including August 25, 1906, upon which last-named date the said banking association and its assets were taken in charge by the Comptroller of the Currency, its officers were forbidden to carry on its business, and the plaintiff was appointed receiver thereof.

The defendant, as a stockholder of said banking association, whose charter expired September 5, 1904, did not assent to the amendment of the articles of association providing for the extension of its charter, and the defendant did not consent to the extension of said charter, and the defendant never became a stockholder in the banking association of which the plaintiff is the receiver.

The defendant further says that, desiring to withdraw from said

old banking association at the time of the expiration of its charter, that is, on September 5, 1904, he, as required by the statutes of the United States in such case provided, within thirty days from the date of said certificate of approval of said amendment of articles of association, gave notice in writing to the creditors of said banking association whose charter expired on September 5, 1904, that he desired to withdraw from said banking association. The defendant did everything which the statutes of the United States required of a dissenting stockholder of a national banking association, and from the time the said banking association, of which the plaintiff is receiver, commenced doing business, that is, on September 6, 1904, the defendant ceased to be a stockholder in the association whose
8 charter expired, and became and was a creditor of the new banking association to the amount of the actual value of said forty (40) shares of stock in the old association, and was a creditor of the new banking association to said amount on the twenty-fifth day of August, 1906, when the plaintiff was appointed receiver, and the defendant is now a creditor of the banking association of which the plaintiff is the receiver and not a stockholder therein.

The defendant says that in accordance with Section 5 of the Act of Congress, approved July 12, 1882, he, on or about November 1, 1904, appointed William R. Dresser, of Brookline, in the county of Norfolk and said Commonwealth, as a member of a committee of three persons, which committee should ascertain the value of the defendant's forty (40) shares of stock in the banking association whose charter expired on September 5, 1904, said value to be ascertained by making an appraisal of the property which said banking association held on September 5, 1904, as provided by said Act of Congress, and the defendant duly notified said banking association of the appointment of said Dresser as aforesaid.

The said William R. Dresser duly accepted his appointment as a member of said committee, and duly notified said banking association of his acceptance; and said banking association, on or about November 15, 1904, appointed one Sylvester B. Hinckley, of Brookline aforesaid, as its member of said committee, and said Hinckley duly accepted his appointment as a member of said committee. Said Hinckley was, at the time of his appointment on said committee, a stockholder in said banking association, its president and a member of its board of directors.

The defendant further says that it became the duty of said Hinckley and Dresser, within a reasonable time after their acceptance of their respective appointments on said committee, in accordance with the provisions of said Act of Congress, to meet and choose a third member of said committee of appraisal, and the defendant says that he repeatedly during the years 1904 and 1905 requested and demanded of said committee that they choose a third member of said committee and proceed to appraise the value of said forty (40) shares of stock so held by him as of September 5, 1904. The said
9 Dresser was at all times ready and willing to proceed with his duties as such appraiser, and endeavored to get the said Hinckley to act with him in choosing a third appraiser and in ascer-

taining the value of said forty (40) shares of stock in said former banking association as of September 5, 1904, when said charter expired, but the said Hinckley always refused and neglected to act as such appraiser, and refused to do anything towards appraising the stock. The defendant alleges that the said Hinckley was unwilling to have said stock appraised by any person outside of said bank because of the fraudulent acts of said Hinckley in using the assets of said banking association, and said Hinckley placed every possible obstruction in the way of an appraisal of the assets of said bank as of September 5, 1904. Said Hinckley, by his refusal to allow said Dresser to act as an appraiser, and by his refusal to choose a third appraiser to act with them, the said Hinckley and Dresser, prevented an appraisal of said forty (40) shares of stock, and fraudulently deprived the defendant of the value of said stock as of September 5, 1904. By the fraudulent acts of said Hinckley, as aforesaid, and by his neglect and refusal to allow said shares of stock to be appraised, the defendant was prevented from obtaining the amount of the value of his said stock as of September 5, 1904. Said Hinckley continued to obstruct and prevent the appraisal of said forty (40) shares of stock up to and including August 25, 1906, the date of the appointment of the receiver of said bank*ruptcy* association.

Since the plaintiff Apsey was appointed receiver as aforesaid, both the said Dresser and the said Hinckley have died.

The defendant has not, since September 5, 1904, when said charter expired, received any income or dividends from said new banking association, has had none of the privileges of a stockholder in said new banking association, and is in no sense a stockholder of the present banking association and has not been a stockholder of said present banking association, but on September 6, 1904, became a creditor of the banking association of which the plaintiff is receiver, and has continued to be a creditor thereof up to the present time to the full amount of the value of said forty (40) shares of stock on September 5, 1904, and was prevented from having his shares of stock in said former banking association appraised and the value thereof paid by him by reason of the fraudulent and negligent acts of said Hinckley, who was president of said banking association as aforesaid.

And the defendant says that he never became a stockholder of the banking association of which the plaintiff has been appointed receiver and that he ceased to be a stockholder of the banking association, whose charter expired on September 5, 1904, on said last-named date and that he is a creditor and not a stockholder of the banking association of which the plaintiff is the receiver, wherefore he cannot be held liable to the plaintiff for said assessment or any part thereof.

By His Attorney, W. H. POWERS.

This cause was thence continued from term to term to the present February Term, A. D. 1908, when, to wit, March 10, 1908, issue being joined, a jury is duly empanelled and sworn according to law to try the issue, the Honorable Frederic Dodge, District Judge for the District of Massachusetts, sitting.

This cause is thereupon committed to the jury, who, after hearing all matters and things concerning the same, return the following Verdict:

Verdict.

March 10, 1908.

The jury find for the plaintiff, and assess damages in the sum of four thousand three hundred and thirty dollars ($4330).

JAMES F. McINTOSH, *Foreman.*

On the twenty-fourth day of March, A. D. 1908, a draft bill of exceptions is filed by defendant and on the twenty-fifth day of March, A. D. 1908, the same is presented to the court under Rule 17, as of date of March 24, 1908.

On the twenty-sixth day of May, A. D. 1908, the following Defendant's Bill of Exceptions is allowed:

11 *Defendant's Bill of Exceptions.*

[Draft Bill Filed March 24, 1908; Bill of Exceptions Allowed May 26, 1908.]

This is an action at law by a receiver of a national bank appointed by the Comptroller of the Currency, to recover an assessment of one hundred per cent of the par value of forty (40) shares of stock in the bank, which assessment was made by the Comptroller of the Currency under Section 5151 of the Revised Statutes of the United States.

The pleadings may be referred to.

The action was tried before a jury. All the facts in the case were agreed upon, and were as follows:

The First National Bank of Chelsea was, prior to August 16, 1906, a banking association duly organized and existing under the provisions of the National Banking Act and amendments, with a capital of $300,000 divided into 3000 shares of the par value of $100 each; that on said August 16, 1906, the said bank closed its doors and suspended business; that on August 25, 1906, the plaintiff was duly appointed by the Comptroller of the Currency, receiver of said bank; that on September 25, 1906, the Comptroller of the Currency ordered an assessment of $100 per share on each share of stock in said bank, payable by the stockholders, according to their respective holdings, on or before October 25, 1906, and ordered the plaintiff to collect and recover the same by proper proceedings; that the defendant received from said receiver a copy of said order of assessment and a separate notice and demand for payment, all of which were in the following form:

No. 533.

Assessment upon Shareholders.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *September* 25, 1906.

In the Matter of THE FIRST NATIONAL BANK OF CHELSEA, MASSACHUSETTS.

To all whom it may concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The First National Bank of
12 Chelsea," Massachusetts, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The First National Bank of Chelsea," Massachusetts, for three hundred thousand dollars, to be paid by them ratably, on or before the twenty-fifth day of October, 1906; and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Albert S. Apsey, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof, I have hereunto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-fifth day of September, A. D. 1906.

[SEAL.] (Signed) WM. B. RIDGELY,
Comptroller of the Currency.

OFFICE OF THE RECEIVER OF THE FIRST NATIONAL
BANK OF CHELSEA, MASSACHUSETTS.
CHELSEA, MASS., *Sept.* 25, 1906.

You will please take notice, that the Comptroller of the Currency has levied an assessment upon the stockholders of The First National Bank of Chelsea, Mass., of one hundred dollars ($100) a share, payable at the office of the receiver, on or before October 25, 1906. The receiver is, however, authorized by the Comptroller to grant an extension, without interest, to shareholders who pay 25 per cent of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed, to pay 25 per cent additional on or before November 25, 1906; 25 per cent on or before

December 25, 1906; and the remaining 25 per cent on or before January 25, 1907.

You are therefore requested to pay the assessment on forty (40) shares of stock standing in your name, in accordance with the foregoing order and this notice, or suit will be commenced to enforce payment.

(Signed) ALBERT S. APSEY,
Receiver First National Bank of Chelsea, Mass.

To George E. Kimball, Boston, Mass.

13 The defendant, on November 18, 1901, became the owner of twenty (20) shares of the capital stock of said bank, and on said date received two certificates, each for ten (10) shares; on November 20, 1901, he became the owner of fifteen (15) shares, and received a certificate therefor; and on August 31, 1904, he became the owner of five (5) shares, and received a certificate therefor. Said four certificates were each and all in the following form, *mutatis mutandis*, and their numbers were respectively 1235, 1236, 1237 and 1283.

Massachusetts.

The First National Bank of Chelsea.

Number 1235. 10 Shares.

This certifies that George E. Kimball of Boston, Mass., is the proprietor of ten (10) shares of the capital stock of The First National Bank of Chelsea, transferable only on the books of the bank in person or by attorney, on the surrender of this certificate. "No transfer of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise."

Chelsea, Nov. 18, 1901.

S. B. HINCKLEY, *President.*

WALTER WHITTLESEY, *Cashier.*

Shares $100 each.

The defendant held said certificates from the respective dates of their issuance, as above specified, down to and after the date of the suspension of the bank, and he had them in his possession and produced them at the trial.

The twenty year period of succession of said bank under the provisions of the National Bank Act expired on September 5, 1904, and on or before said date proper proceedings were taken under the Act of July 12, 1882 (one of the amendments to the National Bank Act), to amend the articles of association so as to extend the period of succession for a period of twenty years from said September 5, 1904, and said articles were so amended.

The defendant did not assent to said amendment, but, acting in

pursuance of the provisions of Section 5 of said Act of July 12, 1882, and within the time therein named, he gave to the bank directors due notice of his desire to withdraw from the asso-
14 ciation, and afterwards appointed one William R. Dresser as one member of the appraisal committee under said Section 5, and gave due notice of such appointment to the directors of the bank, and said directors appointed Sylvester B. Hinckley as a second member of said committee of appraisal, but these two never appointed the third member, and no appraisal was ever made. The said Sylvester B. Hinckley was at said time a director of said bank, its president, and a large stockholder therein.

The defendant, after waiting some months subsequent to the appointment of said Dresser and Hinckley, during which time he made all reasonable efforts in good faith to have said third member appointed, but without result, in September, 1905, retained an attorney, who at once communicated with said Hinckley urging him to join in the making of such appointment, and the said Hinckley, or the bank, also retained counsel, and the two counsel conducted a correspondence on the question of such appointment, which correspondence, however, failed to result in such appointment.

On January 1, 1905, at the time of declaring its regular semi-annual dividend, the bank declared a regular dividend of three (3) per cent to the defendant on said forty (40) shares and sent him a dividend check therefor, which the defendant promptly returned, declaring that he was not a stockholder in the bank, and declining to accept or to use the check. Further regular dividends were declared to him by the bank on July 1, 1905, January 1, 1906, and July 1, 1906, the latter being the last dividend declared by the bank prior to the suspension.

None of the said last-mentioned dividends were sent to or received by the defendant. The defendant was also credited on the bank's ledger with said forty (40) shares. The bank never refused the defendant or withheld from him any of the rights or privileges of a stockholder, but the defendant never used or asserted any of said rights or privileges of a stockholder after September 5, 1904. The following extract from the bank's by-laws was introduced in evidence:

"SECTION 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the Act; and a transfer book shall be kept in which all
15 assignments and transfers of stock shall be made. No transfer of stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends and except in cases of agreement to the contrary expressed in the assignments, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

"SECTION 16. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred the certificates thereof shall be returned to the bank and cancelled and new certificates issued."

The above is all the material evidence in the case.

At the conclusion of the evidence, counsel for both parties agreed that there was no issue of fact to be settled by the jury. The defendant presented the following request for rulings:

Defendant's Request for Rulings by the Court.

1. On all the evidence in the case the plaintiff is not entitled to recover.

2. If, within thirty days after the Comptroller had granted his certificate of approval to the extension of the period of succession by the Chelsea National Bank by amending its articles of association, the defendant gave notice in writing to the directors of said bank of his desire to withdraw from said association, he complied with the requirements of law and did not become a shareholder in the new banking association and, therefore, is not liable in this action.

3. The defendant is not a shareholder of the Chelsea National Bank under its amended articles of association, but is a creditor of the same to the value of his shares at the time of the granting of said certificate of approval by the Comptroller.

4. Under Section 5 of the Act of Congress of July 12, 1882, the only duty devolving upon a shareholder not assenting to the amendment of its articles of association of any National Banking Association is to give notice in writing to the directors within thirty
16 days from the date of the certificate of approval by the Comptroller of his desire to withdraw from said association, and the remainder of Section 5 is simply incidental to such withdrawal and is only declarative of the way and manner of which said shareholder may obtain from the banking association the full value of his shares.

All of the above requests the trial judge refused to grant, to which refusal the defendant duly excepted. The trial judge ruled that on all the evidence the plaintiff was entitled, as a matter of law, to recover the full amount claimed, and directed a verdict for the plaintiff for such amount, to which ruling and direction the defendant duly excepted.

The defendant being aggrieved by the refusal of the presiding judge to give the rulings requested as above stated and being aggrieved by the ruling that the plaintiff was entitled, as a matter of law, to a verdict for the full amount claimed, and by the direction of the judge that the jury return a verdict for the plaintiff, files this bill of exceptions and prays that the same may be allowed.

By His Attorney, W. H. POWERS.

May 26, 1908.—Allowed:
FREDERIC DODGE.
Judge U. S. District Court, Massachusetts.

On the same day the following Judgment is entered:

Judgment.

May 26, 1908.

It is thereupon considered by the court, to wit, May 26, 1908, the Honorable Frederic Dodge, District Judge for the District of Massachusetts, sitting, that the said Albert S. Apsey, Receiver, plaintiff, recover of the said George E. Kimball, defendant, the sum of four thousand three hundred eighty-four dollars and eighty-six cents ($4384.86) damages, and his costs of suit taxed at —.

A true record:

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

17 *Petition for Writ of Error.*

[Filed June 5, 1908.]

Now comes George E. Kimball, defendant herein, and says that on or about the twenty-sixth day of May, 1908, this court entered judgment herein in favor of the plaintiff and against the defendant in the sum of $4384.86 and costs of suit, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals.

GEORGE E. KIMBALL, *Defendant,*
By His Attorney, W. H. POWERS.

Defendant's Assignment of Errors.

[Filed June 5, 1908.]

George E. Kimball, defendant in this action, in connection with and as a part of his petition for writ of error filed herein, makes the following assignment of errors which he avers were committed by the court in the rendition of the judgment against the defendant appearing upon the record therein, that is to say:

First. That the court erred in refusing to grant the following request for ruling as applied to this action, as requested by the defendant: "On all the evidence in the case the plaintiff is not entitled to recover."

Second. That the court erred in refusing to grant the following request for ruling as applied to this action as requested by the de-

fendant: "If, within thirty days after the comptroller had granted his certificate of approval to the extension of the period of succession by the Chelsea National Bank by amending its articles of
18 association, the defendant gave notice in writing to the directors of said bank of his desire to withdraw from said association, he complied with the requirements of law and did not become a shareholder in the new banking association and, therefore, is not liable in this action."

Third. That the court erred in refusing to grant the following request for ruling as applied to this action as requested by the defendant: "The defendant is not a shareholder of the Chelsea National Bank under its amended articles of association, but is a creditor of the same to the value of his shares at the time of the granting of said certificate of approval by the Comptroller."

Fourth. That the court erred in refusing to grant the following request for ruling as applied to this action as requested by the defendant: "Under Section 5 of the Act of Congress of July 12, 1882, the only duty devolving upon a shareholder not assenting to the amendment of its articles of association of any National Bank Association is to give notice in writing to the directors within thirty days from the date of the certificate of approval by the Comptroller of his desire to withdraw from said association, and the remainder of Section 5 is simply incidental to such withdrawal and is only declarative of the way and manner by which said shareholder may obtain from the banking association the full value of his shares."

Fifth. That the court erred in ruling that on all the evidence the plaintiff was entitled, as a matter of law, to recover the full amount claimed by the plaintiff.

Sixth. That the court erred in ruling that on all the evidence (all of which is set out in the defendant's bill of exceptions previously allowed) the plaintiff was entitled to recover anything from the defendant in this action.

Seventh. That the court erred in directing a verdict for the plaintiff for the amount claimed.

Eighth. That the court erred in directing a verdict for the plaintiff.

Ninth. That the court erred in refusing to direct a verdict for the defendant.

Tenth. That the court erred in ruling that upon the evidence the plaintiff could recover.

19 Eleventh. That the court erred in ruling that upon the agreed statement of facts the plaintiff was entitled to recover.

Twelfth. That the court erred in refusing to direct a verdict for the defendant upon the agreed statement of facts, submitted to the court at the time and fully set forth in the defendant's exceptions.

Therefore, this plaintiff in error prays that the said judgment of the Circuit Court may be reversed and that said Circuit Court be directed to grant a new trial of the said cause.

W. H. POWERS,
Attorney for Defendant.

Bond on Writ of Error.

[Filed and Approved June 5, 1908.]

Know all men by these presents, that we, George E. Kimball of Boston, in the county of Suffolk and Commonwealth of Massachusetts, as principal, and American Surety Company of New York, a corporation established under the laws of the State of New York, having an office and usual place of business in said Boston, as surety, are held and firmly bound unto Albert S. Apsey, Receiver of the First National Bank of Chelsea, Massachusetts, in the full and just sum of fifty-five hundred dollars, to be paid to the said Albert S. Apsey, Receiver, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-eighth day of May in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts, in a suit depending in said court between said Albert S. Apsey, Receiver, and the said George E. Kimball, judgment was rendered against the said George E. Kimball, and the said George E. Kimball having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Albert S. Apsey, Receiver, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the third day of July, A. D. 1908.

Now, the condition of the above obligation is such, that if the said George E. Kimball shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plead good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE E. KIMBALL. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK. [SEAL.]
By ELIPHALET F. PHILBRICK,
Resident Vice-President.

Attest:
FRED L. ROBERTS,
Resident Ass't Secretary.

Sealed and delivered in presence of

——— ———.

Approved:
ALBERT S. APSEY, *Receiver.*

Approved:
FREDERIC DODGE,
Judge U. S. District Court, District of Massachusetts.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Albert S. Apsey, Receiver of the First National Bank of Chelsea, having a usual place of business at Boston, State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the third day of July next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Massachusetts, wherein George E. Kimball, of Boston, in the county of Suffolk, within the District of Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts, this fifth day of June, in the year of our Lord one thousand nine hundred and eight.

FREDERIC DODGE,
U. S. District Judge.

21 & 22 *Acknowledgment of Service on Citation.*

BOSTON, *June* 9, 1908.

Due and sufficient service of the within citation is hereby acknowledged on behalf of Albert S. Apsey, Receiver.

GEO. L. WILSON,
Attorney, 15 State Street, Boston.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled,

No. 273. Law Docket.

ALBERT S. APSEY, Receiver, Plaintiff,
v.
GEORGE E. KIMBALL, et-., Trustee, Defendant.

in said Circuit Court determined, the Petition for Writ of Error, the Assignment of Errors, and the Bond on Writ of Error, and also

the original Citation upon the Writ of Error issued in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this third day of July, A. D. 1908.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

23 United States Circuit Court of Appeals for the First Circuit, October Term, 1908.

No. 780.

GEORGE E. KIMBALL, Defendant, Plaintiff in Error,
v.
ALBERT S. APSEY, Receiver, Plaintiff, Defendant in Error.

Error to the Circuit Court of the United States for the District of Massachusetts.

Before Colt, Putnam, and Lowell, JJ.

Opinion of the Court.

November 10, 1908.

LOWELL, *J.:*

The defendant in error, hereinafter called the plaintiff, is receiver of a national bank. The plaintiff in error, hereinafter called the defendant, formerly held forty shares of stock in the bank. On September 5, 1904, the charter of the bank was extended, pursuant to the act of July 12, 1882, 22 Stat. 163. The material part of section 5 of that act reads as follows:

"That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made
24 by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be

sold at public sale, within thirty days after the final appraisal provided in this section."

Within the time limited by statute, the defendant gave the required notice in writing. Thereafter he appointed Dresser as his member of the appraisal committeee, and the bank appointed Hinckley as its member.

The defendant made all reasonable efforts in good faith to have the third member of the committee appointed without result. In September, 1905, he retained an attorney, who communicated with Hinckley, urging him to join in making the appointment. The effort failed. On January 1, 1905, the bank declared a dividend, and sent to the defendant a check for the amount thereof due on forty shares. The defendant promptly returned the check, declaring that he was not a stockholder. Other dividends were declared to the defendant by the bank on July 1, 1905, and January 1, and July 1, 1906. None of these three dividends were sent to or received by the defendant. On the bank's stock ledger the defendant was credited throughout with forty shares. The bank never refused the defendant or withheld from him any of the rights and privileges of a stockholder, but the defendant never used or asserted any of these rights or privileges after September 5, 1904. The stock certificates were in the defendant's possession at the time of trial. The plaintiff was duly appointed receiver of the bank on August 16, 1906. The Comptroller of the Currency duly ordered an assessment of 100 per cent, which the receiver seeks to collect from the defendant in this action.

25 & 26 By the terms of the statute, the defendant ceased to be a stockholder of the bank on giving his notice of withdrawal September 5, 1904. The purpose of the statute is to permit any stockholder under the circumstances stated to withdraw at once from the bank and so to terminate his liability. Congress did not intend that this liability should continue throughout the time taken to appraise the value of the defendant's shares. The defendant ceased to be a stockholder upon his giving the required notice.

But a person who is not a stockholder may yet be liable as a stockholder to the creditors of a corporation, if he has placed his name upon the books of the corporation as a stockholder or, in some cases, if he has permitted his name to remain upon its books after the has ceased to be a stockholder. In such case the stockholder is held liable by estoppel. Nat. Bank v. Case, 99 U. S. 628. The creditors are deemed to rely upon the statements contained in the corporation's books. In the case at bar, a necessary element of the estoppel is wholly wanting. The defendant did not place or cause to be placed his name upon the stock ledger after he had ceased to be a stockholder. He did not permit it to remain upon that book, and its retention was caused solely by a failure of duty on the part of the bank and its officers. Whitney v. Butler, 118 U. S. 655; Earle v. Carson, 188 U. S. 42. Under the circumstances, an offer to surrender the certificates would have been a vain formality. Even if it be admitted that the ingenuity of the plaintiff's counsel has now

suggested some attempt at removal which the defendant omitted to make, and which might possibly have resulted in success, yet this suggestion falls far short of the evidence required to make out the defendant's estoppel. The defendant was not a stockholder in the bank at the time the receivership was instituted, nor was he at that time estopped from denying that he was a stockholder.

In Apsey v. Whittemore, 85 N. E. Rep. 91, where the facts were exactly similar, the Supreme Court of Massachusetts reached our result by a course of reasoning which may be somewhat different from ours, but is in no way inconsistent.

The judgment of the Circuit Court is reversed; the verdict is set aside; the case is remanded to that court for further proceedings consistent with our opinion passed down this day, and the plaintiff in error recovers his costs of appeal.

27 *Final Judgment in Circuit Court of Appeals.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1908.

No. 780.

GEORGE E. KIMBALL, Defendant, Plaintiff in Error,

v.

ALBERT S. APSEY, Receiver, Plaintiff, Defendant in Error.

Judgment in Circuit Court of Appeals.

November 10, 1908.

This cause came on to be heard October 14 and 15, 1908, upon the transcript of record of the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, November 10, 1908, here ordered, adjudged and decreed as follows: The judgment of the Circuit Court is reversed; the verdict is set aside; the case is remanded to that court for further proceedings consistent with our opinion passed down this day and the plaintiff in error recovers his costs of appeal.

By the Court,

CHARLES K. DARLING, *Clerk.*

28 *Petition for Writ of Error.*

United States Circuit Court of Appeals for the First Circuit.

No. 780.

GEORGE E. KIMBALL, Plaintiff in Error,
v.
ALBERT S. APSEY, Receiver, Defendant in Error.

Petition for Writ of Error.

(Filed December 16, 1908.)

Your petitioner, Albert S. Apsey, Receiver, defendant in error in the above-entitled cause, respectfully says that said cause is now pending in the United States Circuit Court of Appeals for the First Circuit, and that a judgment was entered therein on the 10th day of November, 1908, reversing a judgment for your petitioner in the Circuit Court of the United States for the District of Massachusetts; that the matter in controversy exceeds $1,000, besides costs, and the jurisdiction of none of the courts above-mentioned is or was dependent in any wise upon the opposite parties to the controversy being aliens and citizens of the United States or citizens of different states, and that this cause does not arise under the patent laws, the revenue laws or the criminal laws, and that it is not an admiralty cause, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner prays that a writ of error may be allowed him in the above-entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the First Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said petitioner may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

ALBERT S. APSEY, *Receiver.*
By His Attorney, GEO. L. WILSON.

29 *Assignment of Errors.*

United States Circuit Court of Appeals for the First Circuit.

No. 780.

GEORGE E. KIMBALL, Plaintiff in Error,
v.
ALBERT S. APSEY, Receiver, Defendant in Error.

Assignment of Errors.

(Filed December 16, 1908.)

The Circuit Court of Appeals erred as follows:
First. In failing to find and rule that the defendant, plaintiff in

error, having appeared on the books of the Bank at the date of suspension to be the holder of forty (40) shares of its stock, was liable in respect of said forty (40) shares under Section 5151 of the Revised Statutes of the United States.

Second. In failing to find and rule that the giving of notice by a shareholder of his desire to withdraw from a bank, under Section 5 of the Act of July 12, 1882, followed by the nomination on the part of the shareholder and also on the part of the bank's directors of appraisers under said Section, no third appraiser having been chosen and no appraisal ever having been made, does not operate to sever the stockholder's relations with the bank, so as to render him free from liability under Section 5151.

Third. In failing to find and rule that, in order to effect a completed severance of a shareholder's relations with the bank, under said Section 5 of the Act of July 12, 1882, there must be a complete appraisal and a surrender of the shareholder's certificate of shares.

Fourth. In failing to find and rule that in this case the defendant, plaintiff in error, having retained possession and control of his certificates down to the date of suspension, he thereby retained all the rights, privileges and benefits of a shareholder, and is liable as such under Section 5151 of the Revised Statutes of the United States.

Fifth. In failing to find and rule that, upon the whole evidence, the defendant, plaintiff in error, was a shareholder of the said forty (40) shares at the date of the suspension of the Bank, and is therefore liable under Section 5151 of the Revised Statutes of the United States.

Sixth. In failing to find and rule that, upon the whole evidence, the plaintiff, defendant in error, is entitled to recover the full amount claimed by the declaration, with interest.

Seventh. In ruling that, by the terms of Section 5 of the Act of July 12, 1882, the defendant, plaintiff in error, ceased to be a stockholder of the Bank on giving his notice of withdrawal.

Eighth. In ruling that the purpose of said Section 5 of the Act of July 12, 1882, is to permit any stockholder under the circumstances stated in this case to withdraw at once from the Bank and so to terminate his liability.

Ninth. In ruling that, in and by said Section 5 of the Act of July 12, 1882, Congress did not intend that the stockholder's liability should continue throughout the time taken to appraise the value of his shares.

Tenth. In finding and ruling that the defendant, plaintiff in error, ceased to be a stockholder upon giving the statutory notice under said Section 5 of the Act of July 12, 1882.

Eleventh. In reversing the judgment of the Circuit Court in this case.

GEO. L. WILSON,
Attorney for Defendant in Error.

Dated December 15, 1908

31 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to George E. Kimball, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the United States Circuit Court of Appeals for the First Circuit wherein Albert S. Apsey, Receiver, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Senior Circuit Judge, and a Judge of the United States Circuit Court of Appeals for the First Circuit, this sixteenth day of December, in the year of our Lord one thousand nine hundred and eight.

LE BARON B. COLT,
Senior Circuit Judge.

32 DEC. 17TH, 1908.

Due and sufficient service of the within citation is hereby acknowledged.

W. H. POWERS,
Attorney for George E. Kimball.

33 *Clerk's Certificate.*

United States Circuit Court of Appeals for the First Circuit.

No. 780.

GEORGE E. KIMBALL, Defendant, Plaintiff in Error,
v.
ALBERT S. APSEY, Receiver, Plaintiff, Defendant in Error.

Clerk's Certificate.

I, Charles K. Darling, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages, numbered 1 to 21, hereto prefixed, contain and are a true copy of the Writ of Error to the Circuit Court of the United States for the District of Massachusetts, and the return of said Circuit Court thereon, in the cause entitled in said Circuit Court,

No. 273. Law Docket.

ALBERT S. APSEY, Receiver, Plaintiff,
v.
GEORGE E. KIMBALL et —, Trustee, Defendant.

I further certify that said pages 1 to 21, inclusive, contain and are a true copy of the record upon which the said cause was heard in said Circuit Court of Appeals October 14 and 15, 1908.

I further certify that the printed pages, numbered 23 to 25, inclusive, hereto prefixed, contain and are a true copy of the Opinion of said Circuit Court of Appeals in said cause, that page 27, hereto prefixed, contains and is a true copy of the Final Judgment entered in said cause November 10, 1908, and that pages 28, 29, 30, 31 and 32, hereto prefixed, contain a true copy of the Petition for Writ of Error, Assignment of Errors by Albert S. Apsey, Receiver, and the original Citation with Acknowledgment of service thereon.

I further certify that pages 1 to 32, hereto prefixed, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals, to and including December 18, 1908, and that a mandate has not issued therein.

34 In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this eighteenth day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, First Circuit.]

CHARLES K. DARLING, *Clerk*.

Endorsed on cover: File No. 21,473. U. S. Circuit Court Appeals, 1st Circuit. Term No. 132. Albert S. Apsey, receiver of The First National Bank of Chelsea, plaintiff in error, vs. George E. Kimball. Filed January 14th, 1909. File No. 21,473.

Supreme Court of the United States.

No. 132.

ALBERT S. APSEY, Receiver of the First National Bank of Chelsea,

PLAINTIFF IN ERROR,

v.

SIDNEY E. WILBUR, Executor of George E. Kimball, Deceased,

DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

History of the Action.

This action at law was brought in the United States Circuit Court for the District of Massachusetts to recover an assessment levied on the defendant in error's testator as a stockholder in a national bank, under section 5151 of the United States Revised Statutes. The action was tried to a jury on an agreed statement of facts (which facts appear on pages 10, 11, 12, 13, and 14 of the Record). At the conclusion of the evidence the defendant presented requests for rulings (see page 14 of Record), all of which the presiding justice overruled, and directed a verdict for the plaintiff for the full amount claimed (see page 14 of Record). Judgment was entered accordingly in the Circuit Court, and the defendant in error took the action to the Circuit Court of Appeals for the First Circuit by writ of error and on assignments of error which appear at the bottom of page 15 and on page 16 of record.

The Circuit Court of Appeals, after full argument, reversed the judgment of the Circuit Court, ordered the verdict set aside, and the case remanded to the Circuit Court for further proceedings consistent with the opinion of that Court (p. 21 of Record).

The plaintiff in error brings the action to this Court by writ of error, and his assignments of error appear at the bottom of page 22 and on page 23 of the record.

Statement of the Case.

The First National Bank of Chelsea was, down to August 16, 1906, a banking association duly organized and existing under the provisions of the National Bank Act and amendments, with a capital of $300,000, divided into hundred dollar shares. On August 16, 1906, the bank failed, and on August 25, 1906, the plaintiff was duly appointed, by the Comptroller of the Currency, receiver of said bank. On September 25, 1906, the Comptroller, acting in pursuance of the power given him in that regard by section 5234 of the Revised Statutes of the United States (part of the National Bank Act), ordered an assessment of $100 per share on each share of the capital stock, to be paid by the stockholders, according to their respective holdings, on or before October 25, 1906, and directed the plaintiff to collect and recover the same by proper proceedings. This assessment was for the purpose of enforcing the stockholders' liability provided by section 5151 of the Revised Statutes of the United States (part of the National Bank Act).

A copy of the order of assessment appears on page 11 of the record, and recites that the assessment was made after proper accounting by the receiver and a valuation of

the uncollected assets, and a determination by the Comptroller that the assessment was necessary in order to pay the debts of the bank.

The defendant, on November 18, 1901, became the owner of twenty shares of the capital stock of said bank, and on said date received two certificates, each for ten shares. On November 20, 1901, he became the owner of fifteen additional shares and received a certificate therefor. And on August 31, 1904, he became the owner of five additional shares and received a certificate therefor. This made forty shares in all, and the form of certificate issued to him appears on page 12 of the record. These certificates he held from the respective dates of their issuance, as above specified, down to and after the date of the suspension of the bank, and he had them in his possession and produced them at the trial. He received from the plaintiff a copy of said order of assessment and a separate notice thereof and demand for payment of the assessment on his forty shares of stock, and a copy of said last-mentioned notice and demand appears at the bottom of page 11 and top of page 12 of the record.

This suit is brought to recover said assessment.

Mr. Kimball's defense rested upon the following facts: On September 5, 1904, about twenty-two months prior to the failure of the bank, the twenty-year period of succession of the bank, under the provisions of the National Bank Act, expired. Prior to said September 5, by proper proceedings taken under the Act of July 12, 1882 (one of the amendments to the National Bank Act), the Articles of Association were amended so as to extend the period of succession for another term of twenty years from said September 5, 1904. The defendant was a non-assenting stockholder, and under the provisions of section 5 of said Act of

July 12, 1882, he gave timely and proper notice to the bank directors that he desired to withdraw from the bank. He afterwards appointed a member of the committee of appraisal provided for in said section 5; and the directors of the bank duly appointed a member; but the two so appointed never appointed the third member, and no appraisal was ever made. The member appointed by the directors of the bank was a director and president and a large stockholder in the bank. In September of 1905 the defendant retained counsel, who endeavored to get the two members to agree upon a third, so as to fill the appraisal committee, but without success.

The defendant's contention was that, having given notice of his desire to withdraw from the association, and not having thereafter accepted any dividends upon his stock, or used or asserted any of his rights or privileges as a stockholder, he was not lawfully a stockholder upon whom an assessment could be made under section 5151, though he retained his certificates and remained as the record owner of the shares on the books of the bank.

The only further facts to be noted are that, at each regular semiannual-dividend day subsequent to the receipt of the defendant's notice of desire to withdraw, the bank declared to him a regular dividend on his forty shares. The check for the first of said dividends was sent to him, but he returned it, declaring that he was not a stockholder; and dividend checks for the subsequent dividends were issued, but not sent to him. There was, however, no evidence offered or introduced tending to show that the bank ever refused the defendant, or withheld from him, any of his rights or privileges as a stockholder, and he appeared on the bank's books as the holder and owner of said forty shares.

By-laws of the bank were put in evidence, providing that the bank's stock was assignable only on the books of the bank, and that dividends should be paid to the stockholder in whose name the stock should stand on the day of the declaration of the dividends; and also providing that, when stock was transferred, the certificates were to be returned to the bank and canceled, and new certificates issued. (See pages 13, 14 of the Record.)

No evidence was introduced tending to show any fraud or fraudulent acts on the part of Hinckley, one of the appraisers, or that the said Hinckley prevented the making of the appraisal contemplated by the statute, as alleged in the defendant's answer (p. 9 of the Record).

Argument.

The Act of July 12, 1882, under one section of which the defendant's sole defense to the action arises, was an Act of Congress passed in amendment of various phases of the National Bank Act as it then stood; but the only portions of that Act having any bearing on this case are the first five sections.

Section 1 provides, in substance, that any national banking association may, at any time within two years next previous to the date of expiration of its period of succession, extend said period of succession for an additional twenty years, by amending its articles of association; and that thereupon it shall have succession for the extended period, unless sooner dissolved by its shareholders, or unless it shall forfeit its franchise by violation of law.

Section 2 provides, in substance, that such amendment to the articles of association must be authorized by the written consent of the holders of not less than two thirds

of the capital stock, and that, after such consent, the same shall be certified to the Comptroller, with an application for approval of the amendment; and the Comptroller must issue a certificate before the amendment shall be valid.

Section 3 throws upon the Comptroller the duty, upon receipt of the certificate of consent and the application for approval of the amendment, to have a special examination of the bank made, at its expense, and if upon such examination he finds the association to be in satisfactory condition, he gives a certificate of approval; otherwise he withholds it.

Section 4. "That any association so extending the period of its succession *shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed, by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession.*" Then follows a proviso not material to this action, relating to jurisdiction of suits by or against the bank.

Section 5. "That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors,

and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; *and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within 30 days after the final appraisal provided in this section.*" Then follows a proviso not material to this action.

The defendant's contention arises solely under the above-quoted section 5. He says that, not having assented to the amendment, and having given timely notice of his desire to withdraw, he thereupon became, and thereafter remained at all times, a creditor of the association instead of a stockholder, and became entitled to receive from the association the then value of his shares; and that the facts that no appraisal was ever made, and that he never surrendered his certificates, and that he at all times held and retained said certificates down to the time of suit, are immaterial, because, he says, the statute, from and after the date of his notice of desire to withdraw, gave him the status of a creditor.

If this contention is correct, then it is lawfully possible for stockholders in a national bank to reduce the aggregate of its capital stock below the amount fixed by its articles of association, and for which it has always stood in the eye and mind of the public, by simply performing cer-

tain voluntary acts in their own behalf, while at the same time retaining in their possession their certificates, which are, to quote the language of the Supreme Court of the United States in *Pacific National Bank* v. *Eaton*, 141 U.S. 227, at page 234, "authentic evidence of title to stock," and while also they appear and remain on the books of the bank as the owners of the shares in question.

It is submitted that this contention would lead to the most absurd result, if sustained. It would mean that, regarded for the purposes of assessment under section 5151 of the Revised Statutes, a bank's total capital stock can lawfully be less in amount than it openly appears to be, while at the same time certificates remain outstanding for the whole value of such apparent total — certificates which could be enforced against the bank while a going concern, if not by the notice-giving shareholder, at least by transferees who might purchase the same from such shareholder in good faith and for value.

So far as we have been able to ascertain, section 5 of the Act of July 12, 1882, has never been judicially construed outside of the present case excepting in the case of *Apsey* v. *Whittemore*, 199 Mass. 65, decided in the Supreme Judicial Court of Massachusetts upon the same facts that appear here, saving that there was another defendant and the number of shares was different.

In that case, the Supreme Judicial Court of Massachusetts was of opinion that Mrs. Whittemore was not a stockholder upon whom an assessment could be levied under section 5151, the Court saying that the case was analogous to *Earle* v. *Carson*, 188 U.S. 42, and *Whitney* v. *Butler*, 118 U.S. 655, and the conclusion being, in the language of the Court, "that within a fair and reasonable construc-

tion of the Statute, the defendant had withdrawn from the association for the extended period of succession, and had ceased to be a stockholder at the time when the assessment was levied, and is not liable therefor."

With all due respect to the Supreme Judicial Court of Massachusetts, the reasoning employed by it in that case seems to be open to the criticism that, in addition to directly misconstruing the provisions of section 5 of the Act of July 12, 1882, it failed to give due weight to three important factors; namely, first, that the bank's character and identity were not changed in the least by the extension of its period of succession (see Act of July 12, 1882, sec. 4), but that, on the contrary, it continued to be in all respects the identical association it was before the extension; secondly, that Mrs. Whittemore retained her certificates, and, through them, the full title to her shares, at all times after she gave her notice of withdrawal down to the time of trial, and that she remained at all times the open and unprejudiced owner of the shares on the books of the bank; and thirdly, and perhaps most important of all, that the suit was not brought to determine the rights of herself and the bank as against each other while the bank was a going concern, but, on the contrary, was to enforce the rights of creditors against Mrs. Whittemore as the record owner of shares, and the actual holder of certificates of shares after the bank had suspended and an assessment had been made under section 5151.

That Court, in its effort to give a general construction to the meaning of section 5, said (p. 68),—

> "The Statute provides a method, as it is reasonable that it should, by which a stockholder who does not assent to the extension of the period of succession may withdraw from the association and have the value of

his shares determined and paid to him. *By pursuing the method thus presented, the stockholder becomes a creditor of the association to the amount of the value of his shares as thus determined, and his rights and liabilities as a stockholder cease.*"

It is submitted that this construction is superficial. The section in question provides that the stockholder may give his notice, "in which case he shall be entitled to receive" from the bank "the value of the shares . . . to be ascertained by an appraisal" by a committee selected as provided in the section.

Then follow provisions for an appeal by the shareholder to the Comptroller, and a reappraisal, "which shall be final and binding."

Down to the point of final and binding appraisal it seems plain that the stockholder has not become a creditor. The section, in general terms, entitles him to receive the value of his shares, *as finally fixed by the appraisers or by the Comptroller upon appeal and reappraisal*, but that is not the same thing as saying that he becomes irrevocably a creditor so soon as he has started in to pursue the method outlined in the section. There is no guaranty that he may not change his mind after giving his notice and appointing his appraiser. Down to the time when the final and conclusive appraisal has been made and declared, and the value for all time fixed, the shareholder in question occupies an executory position, so far as his general rights are concerned. And it is only when the value of the shares has been finally ascertained and determined,—when the appraisal proceedings have reached the stage of final judgment,—and when the stockholder has surrendered his certificates, that he changes into a

creditor entitled to immediate payment from the bank. The section goes on to provide that the shares so surrendered and appraised shall be publicly sold after notice, within thirty days after final appraisal; evidently so that no reduction of capital should result from the operation of the section.

In the interim between the giving of the notice of withdrawal and the final appraisal the stockholder's status is not changed unless he has surrendered and given up his certificates, and probably not even then. He may still, for aught that appears either directly or by implication from the section, take his dividends and sit in meetings, or sell his stock, or withdraw his notice, or what not. The whole gamut of rights, privileges, and benefits is open to him. And when the final appraisal has been made and the value determined, he must surrender, or offer to surrender, his shares as a condition precedent to getting his money. But he cannot blow hot and blow cold. If, while giving his notice and appointing his appraiser, he holds on to his certificates, knowing also that he remains on the books of the bank as the owner of the shares represented by them, and thereby keeps himself in the position to take his dividends if he chooses, or vote at stockholders' meetings if he wants to, or sell and transfer his stock to any one in the world who will pay value for it, he must be regarded as still a shareholder, so far as concerns the rights of creditors under section 5151. Having so kept that status, with the untrammeled right of transferring it to others and giving such others good title to it as against the bank, he cannot at the same time claim that he is a creditor instead of a stockholder, when he finds that the bank has gone down instead of up.

Supposing, for argument's sake, that the bank in ques-

tion had, on August 16, 1906 (the day of failure), instead of closing its doors, found itself able to announce an extra dividend of $100 per share out of profits earned through some great stroke of fortune, but entirely earned subsequent to the date when Kimball gave his notice of withdrawal. Is it possible to say that the giving of his notice had shut him out from participation in those extra profits, while he still retained his certificates and appeared on the bank's books as the owner of the forty shares, and had been awarded regular dividends upon them in the interim? There seems to be only one possible answer to that question, and that is that Kimball would undoubtedly be a stockholder, entitled to the extra profits.

For these reasons it is confidently submitted that the Supreme Judicial Court of Massachusetts has failed to give a satisfactory construction of the section in question, especially in the light of other commanding provisions of the National Bank Act and decisions thereunder, to which we now proceed to refer.

The section in question, and the Act of which it is a part, are but formal and perfunctory amendments of the National Bank Act, and they should be so construed as to keep them in harmony with the rest of the Act, as consistent subordinate parts of a great organic whole. No interpretation can satisfy the rational mind if it ignores this paramount rule of statutory construction. To so interpret amendments as to do violence to the character and functions of the main structural provisions of the original Act is shortsighted and mischievous. Even though the sum of money involved is trivial, and though one's natural sympathies run in favor of the pursued, it is nevertheless of prime value and importance, in a case of new impression, to stick to the law.

Section 5151 of the Revised Statutes, which is part of the National Bank Act, is one of the most important and familiar elements of the scheme of the National Bank Act. It provides that the shareholders of a national bank shall be individually responsible, equally and ratably, and not one for the other, for all its contracts, debts, and engagements, to the extent of the amount of the par value of their stock therein, in addition to the amount invested in the shares. This provision is enforced after suspension by the receiver under the direction of the Comptroller, and express power for that purpose is given the Comptroller and the receiver by section 5234 of the Revised Statutes (also part of the National Bank Act).

This section 5151 has been said by the Supreme Court of the United States, in *Richmond* v. *Irons*, 121 U.S. 27, pp. 55, 56, to be an "essential element of the contract by which the stockholders become members of the corporation. . . . Its obligation becomes a part of every contract, debt and engagement of the Bank itself, as much so as if they were made directly by the stockholder instead of by the corporation."

This construction has been uniformly adhered to by the Supreme Court of the United States, and in *Stuart* v. *Hayden*, 169 U.S. 2, at page 8, the same Court said that the safety of a national bank, "so far as its creditors are concerned, depends largely upon the security given by the statutory provision entitling creditors to look to the individual liability of shareholders. . . ."

The section therefore imposes upon shareholders a contractual liability, just the same as if they had individually entered into the contract in express terms; and that lia-

bility has been imposed, not for the safety or security of the bank as a going concern, but of its creditors in case it should fail to pay its debts. They are the persons benefited, and to be benefited, by the section in question, and only very rarely and in exceptional cases have stockholders — meaning record stockholders on the books of the bank — been able to escape the enforcement of the contractual liability so imposed upon them for the safety of creditors.

Another part or element of the National Bank Act which should be borne in mind when construing section 5 of the Act of July 12, 1882, is section 5210 of the Revised Statutes, which throws upon the president and cashier of each bank the imperative duty of keeping at all times at its place of business a full and correct list of the names and residences, and the number of shares held by each shareholder, such list to be daily open to inspection of all shareholders and creditors of the bank and all state taxation officers.

Construing this provision, the Supreme Court of the United States said in *Pauley* v. *Trust Co.*, 165 U.S. 606, pp. 621, 622, —

> "*Manifestly, one, if not the principal, object of this requirement, was to give creditors of the association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements.*
>
> "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts and obligations, holds himself out in the books of the asso-

ciation as the true owner, may be treated as the owner and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a Receiver. But *this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner, and he will not be permitted, after the Bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of stockholders required to be kept for the inspection of creditors and others would lose most of its value.*"

Another part or element of the National Bank Act, without which a proper construction of section 5 of the Act of July 12, 1882, cannot be made, is section 5139 of the Revised Statutes, which provides that the capital stock shall be transferable only on the books of the association, though the method of transfer may be regulated by the by-laws or articles of association; and every person becoming a shareholder by transfer "shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of said shares; *and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired.*"

In *Richmond* v. *Irons*, 121 U.S. 27, one question in the case was whether Comstock, the record owner of 150 shares at the time of the bank's failure, was liable on them under section 5151. Comstock proved actual sales of 100 of his shares some time prior to the day of failure,

and in good faith; but no transfers thereof were made on the bank's books until the very day of failure. The Supreme Court held him liable on the whole 150 shares, saying, at page 58, —

> "By Section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered in the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law."

In *National Bank* v. *Case*, 99 U.S. 628, the Supreme Court, in holding liable under section 5151 a pledgee of national bank stock who had caused the same to be transferred to it on the bank's books, said, at page 631, —

> "It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* v. *Upton* (96 U.S. 328) and like decisions abound in the English courts and in numerous American cases, to some of which we refer. (Citations.) For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made: another is that by taking the legal title he has re-

leased the former owner; *and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder.*"

Again, in *Anderson* v. *Philadelphia Warehouse Co.*, 111 U.S. 479, the Supreme Court said, at page 483, —

> "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only. . . ."

Again, in *Matteson* v. *Dent*, 176 U.S. 521, at 530, the Supreme Court said, —

> "But the settled doctrine is that, as a general rule, the legal owner of stock of a national banking association — that is the one in whose name stock stands on the books of the association — remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the book of registry of the association, such registered owner remains liable."

The two sections above quoted, namely, 5139 and 5210, read in the light of the decisions which have been made thereunder, effectually establish the general rule that the records of the bank at the time of insolvency determine the question who are, and who are not, shareholders of the association liable to the assessment under section

5151. It has also been determined by numerous decisions that the liability under section 5151 is not in favor of the bank, but of its creditors, and does not arise until the bank becomes insolvent. See, for instance, —

Wickham v. *Hull* (Iowa), 71 N.W. Rep. 352, 353.
Irons v. *Manufacturers Bank*, 21 Fed. Rep. 197.
Scott v. *Deweese*, 181 U.S. 202, 212, 213.

A shareholder, then, who appears on the books of the bank at the time of suspension as the owner of the shares in question is, with certain exceptions, regarded as liable for the assessment on the shares under section 5151. In *Richmond* v. *Irons*, 121 U.S. 27, this was so as to Comstock, although he had previously parted with his shares in good faith and for value. In numerous other cases the same rule has been applied to the same facts. In other cases, where a man or corporation has taken shares in pledge, but has neglected to have himself described as pledgee on the books of the bank, the liability has been enforced against him. In still other cases, where a shareholder, knowing of approaching insolvency, has made out-and-out transfers on the books of the bank to irresponsible persons for the purpose of escaping liability under section 5151, the Supreme Court has ignored the transfer, and pursued the transferrer as the true holder and owner. *And it may be said to be true that, when a national bank suspends, there is always some one on the face of the earth who is liable for the assessment in respect of every share of its outstanding stock, provided you can lay your finger on the proper person before the statute of limitations bars recovery.* In cases where a pledgee has been relieved

from liability because he was so described in the transfer, the pledgor would undoubtedly be liable. And in cases where a transferrer, appearing on the books as the record owner, has escaped liability, his transferee would undoubtedly be liable. Similarly, when a transferee has escaped liability, his transferrer would be liable. *The creditors of an association are entitled to assume that there is some one liable for each share of its whole apparent outstanding capital stock in case of suspension.*

In the case of *Whitney* v. *Butler*, 118 U.S. 655, the Whitneys escaped liability on the special ground that they had actually sold the stock at public auction through R. L. Day & Company, and had delivered the certificates, with a blank power of attorney authorizing the proper officer of the bank to complete the transfer on the books, and that the certificate, with such power of attorney, had actually been delivered to the proper officer of the bank for the purpose of transfer. The Supreme Court likened their position to that of one who would take a deed of land to the proper record office to be recorded, saying that the general rule is that the deed is regarded as recorded when delivered to the register, whether actually entered on the books or not. But, in that case, the persons to whom the stock was sold would undoubtedly have been held liable upon the shares in question, if proceeded against in due time. So, also, as to *Earle* v. *Carson*, 188 U.S. 42.

If, however, the defendant's contention here is sustained, then, in respect of the 40 shares of stock represented by his certificates, there was no one on the face of the earth answerable for the liability under section 5151, and therefore the fund provided by the National Bank Act for the

security of the creditors of this association was not $300,000, as the books showed, and as everybody supposed and had a right to suppose that it was, but was $296,000; while, at the same time, Kimball held certificates representing the missing $4000, which he could at any time have sold and transferred, and given the purchaser a good title thereto as against the bank.

> "Shares in the capital stock of associations under the National Banking Law," to quote the language of the Supreme Court of the United States in *Johnston* v. *Laflin*, 103 U.S. 800, p. 803, "are salable and transferable at the will of the owner. They are, in that respect, like other personal property. The Statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. . . ."

And at page 804:

> "The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies."

See also Mass. St. 1903, c. 457, sec. 28.
Clews v. *Friedman*, 182 Mass. 555.
Earle v. *Carson*, 188 U.S. 42, 46.

Such a construction of section 5 of the Act of July 12, 1882, would injure no one on earth except the creditors, for whose especial benefit section 5151 was enacted; and would set at naught the decisions of the Supreme Court of the United States under section 5151, and the whole substructure of reasoning upon which they are based. That

reasoning shows that the status of a stockholder of a national bank, when regarded for the purposes of assessment under section 5151, is very often different from his status as a shareholder between himself and the bank before suspension. People have been held liable for assessment when, by their own acts, they had so placed themselves that they could not assert stockholders' rights as against the bank while a going concern. The reason of this is that the records of the bank are, as a rule, the controlling evidence upon which the creditors' rights are founded. And it may be pertinently asked, What does the evidence in this case show that the creditors of this association knew concerning Kimball's notice of withdrawal or the appointment of the two appraisers? Is it not true that they had every right, under the National Bank Act and the Supreme Court decisions, to assume that Kimball was the holder of the 40 shares in question, so far as regards section 5151? If this is not true, then the acts of Kimball along the line of withdrawal under section 5 of the Act of July 12, 1882, though acts without the knowledge of the creditors, effectually operated to deny to them the benefits of section 5151, while they did not put an end to the rights of Kimball as a stockholder of the bank before suspension.

The true test of this case is that we are not now concerned at all with Kimball's rights against the bank, or the bank's rights against him, before suspension. The receiver represents the creditors, and he is now enforcing the rights of creditors, who go, and are entitled to go, by the record. And it is submitted that the record in this case must be held conclusive against Kimball. Otherwise, no adequate force or effect is given to sections 5210, 5139, or 5151, but the stockholder escapes the liabilities pertaining to his situation, and with his certificates in his pocket.

In *Scott* v. *Deweese*, 181 U.S. 202, Deweese was receiver of a failed national bank. Scott held some of its stock. The Comptroller ordered an assessment, and Deweese demanded payment from Scott of his proportionate part, and, payment being refused, brought the action. The defense was that Scott became a stockholder at a time when the bank increased its capital from $100,000 to $250,000; that he paid for 50 shares of the new capital, and received certificates therefor; that the bank's officers led him to believe that the whole $150,000 of new stock had been paid in, though, in fact, only about two thirds of it was ever paid in; and that therefore, under section 5142 of the Revised Statutes (part of the National Bank Act), the increase was invalid, and the defendant was not lawfully a stockholder.

The Circuit Court ordered judgment for the receiver on his motion. The Circuit Court of Appeals affirmed that judgment (89 Fed. Rep. 843–856), and Scott then took the case to the Supreme Court on writ of error.

Mr. Justice HARLAN, after stating the facts and citing from the pleadings and Revised Statutes, said, at page 209, —

> "The defendant lays great stress on the words in Section 5142 'no increase of capital shall be valid until the whole amount of such increase is paid in' and until the Comptroller shall certify that the amount of the proposed increase 'has been duly paid in as part of the capital of such association.' But does it follow that one who claimed to be a shareholder in respect of an increase of the bank's capital, and who was recognized as such by the bank, particularly if he held a formal certificate stating that he was a shareholder, can escape liability, under Section 5151, by

simply proving — after the bank has suspended and has been placed in the hands of a Receiver — that the *whole* amount of the proposed increase was not in fact paid in as required by Section 5142, although the contrary was certified by the Comptroller upon the bank's report to that officer? We think not."

Again, at page 210:

"*As between the bank and the defendant, the latter, having paid the amount of his subscription for shares in the proposed increase of the capital, was entitled to all the rights of a shareholder, and therefore, as between himself and the creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him.*"

Again, at pages 212 and 213:

"It may be — although upon this question we express no opinion — that the defendant, by proper proceedings instituted in good faith and in due time before the suspension of the Bank, could have had his subscription cancelled upon the ground that the whole amount of the proposed increase of capital had not in fact been paid in, although according to the pleadings the contrary was certified by the Comptroller. *But immediately upon the failure of the Bank the rights of creditors attached under Section 5151, and a shareholder who was such when the failure occurred could not escape the individual liability prescribed by that section upon the ground that the Bank has issued to him a certificate of stock before, strictly speaking, it had authority to do so.* . . .

"If this be a sound view, as we think it is, *it fol-*

lows that one holding stock in a national bank which is so far valid as to entitle him to enjoy, and who is accorded the right to enjoy, the privileges of a shareholder as against the bank, is a shareholder upon whom assessments may be made in conformity with Section 5151."

And again:

"The present suit is primarily in the interest of creditors of the Bank. It is based upon a statute designed not only for their protection but to give confidence to all dealing with national banks in respect of their contracts, debts and engagements, as well as to stockholders generally. *If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the Bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors,* to deny that he is a shareholder within the meaning of Section 5151, *if at the time the rights of creditors accrued he occupied, and was accorded the rights appertaining to, that position.*"

Again, at page 215, quoting from *Minor* v. *Mechanics Bank*, 1 Peters, 46:

"The stock was lawfully created, the defendant subscribed for the shares in question and paid for them and received his certificate; and nothing was afterwards done by the directors, the Comptroller of the Currency, or the stockholders in meeting assembled, which they had not a perfect right to do. *The defendant became a stockholder; he held the shares in*

question when the Bank finally went into liquidation; and, of course, became liable under Section 5151 of the Revised Statutes to pay an amount equal to the stock by him so held."

In *Lantry* v. *Wallace*, 182 U.S. 536, Wallace was receiver of a failed national bank, and Lantry held 200 shares of its stock. The Comptroller ordered an assessment of 100 per cent, Lantry refused to pay, and the suit was brought to recover the assessment. Lantry alleged in his answer that he was induced to purchase the stock by false and fraudulent misrepresentation and concealment by the president of the bank as to the bank's financial condition, whereby he was led to believe, and did believe, that it was perfectly solvent, and its stock unimpaired. He purchased and paid $20,000 for the 200 shares about six months before failure, and he alleged that at the time of such purchase the bank was in fact insolvent and its stock utterly worthless.

On demurrer to the answer the Circuit Court gave judgment for the plaintiff, which was affirmed in the Circuit Court of Appeals (97 Fed. Rep. 865), and Lantry took the case to the Supreme Court on writ of error. The Supreme Court affirmed the judgment. (See the Opinion at page 554.)

In the case at bar, whatever may have been the actual cause of the non-appointment of the third appraiser, so soon as that clearly appeared to the defendant, his proper course, if he desired to escape liability under section 5151, was to have brought proper proceedings in due time before the failure of the bank, either to have his stock surrendered and canceled, and the fair value of it paid to him outside

the statute, or to have the appraisers compelled to nominate a third, so that the appraisal could be made and the proceedings completed under the statute. Instead of that, he, for nearly two years, acquiesced in the non-appointment of the third man, neglected to take plenary proceedings to terminate his relations with the bank as a shareholder; never surrendered, or offered to surrender, but retained, his certificates and all the rights that went with them; remained all the time the record owner of the shares on the books of the bank; was accorded full and regular dividends thereon; could at any moment have received a substantial consideration for the shares by selling them; or could have taken the dividends upon them, and enjoyed all the other rights of a shareholder. He is therefore estopped, as against the creditors of the association, from claiming that he is not a shareholder for the sole purpose of escaping from his liability under section 5151.

For all these reasons it is submitted that the Circuit Court of Appeals erred in reversing the judgment of the Circuit Court and otherwise as alleged in the assignments of error on pages 22 and 23 of the record.

Respectfully submitted,

GEO. L. WILSON,

Counsel for Plaintiff in Error.

(21,473)

Supreme Court of the United States.

October Term, 1910.

No. 132.

ALBERT S. APSEY, Receiver of the First National Bank of Chelsea,

PLAINTIFF IN ERROR,

v.

SIDNEY E. WILBUR, Executor of George E. Kimball, Deceased.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Defendant in Error.

STATEMENT OF CASE.

This is an action at law by the receiver of the First National Bank of Chelsea to recover an assessment made by the Comptroller of the Currency upon the stockholders of the said bank, under section 5151 of the Revised Statutes of the United States.

The twenty-year period of succession of said bank expired on September 5, 1904, and the articles of association were amended so as to extend said period for twenty years from said date.

Said George E. Kimball dissented from this amendment to the articles of association, and, acting under the provisions of section 5 of the Act of July 12, 1882, and within the time fixed by said Act, he gave the bank directors due notice of his desire to withdraw from the association, and within the time prescribed by the statute appointed a member of an appraisal committee, under said section 5, and gave due notice of such appointment to the bank (Record, pp. 12, 13, 20). The bank appointed as a member of the appraisal committee one Hinckley, who was, at the time, president of said bank, one of its directors, and a large shareholder therein (Record, p. 13). These two members of the committee never appointed a third member, and no appraisal of stock was made.

Said Kimball made all reasonable efforts, in good faith, to have a third member appointed, but without result (Record, pp. 13, 20), and employed an attorney, who urged Hinckley to join in making such appointment, and who conducted a correspondence with the attorney for said bank, or said Hinckley, endeavoring to bring about the appointment of a third member of such committee. But such correspondence did not result in the appointment of a third member of said committee (Record, pp. 13, 20).

On January 1, 1905, the bank declared a dividend to its shareholders, and sent a check for the dividend to said Kimball. He at once returned this check, with a statement that he was not a shareholder, and declined to use or accept the check (Record, pp. 13, 20). Other dividends were declared to the shareholders of the bank, but no check was sent to said Kimball therefor (Record, pp. 13, 20). On August 16, 1906, the bank closed its doors and suspended business, and on August 25, 1906, the plaintiff was appointed receiver of the bank.

On September 25, 1906, the Comptroller, acting in pursuance of section 5234 of the Revised Statutes of the United States, ordered an assessment of one hundred dollars ($100) a share, to be paid by the shareholders. This assessment was for the purpose of enforcing the shareholders' liability, provided for by section 5151 of the Revised Statutes of the United States.

The case was tried before a jury in the Circuit Court of the United States for the District of Massachusetts on an agreed statement of facts (see pages 10 to 14, inclusive, of the record), and a verdict was rendered for the plaintiff, by order of the Court, for the full amount claimed. The defendant's testate alleged exceptions, which were allowed May 26, 1908, and thereupon the case was taken, by writ of error, to the Circuit Court of Appeals for the First Circuit, and an opinion and judgment was rendered by the said Circuit Court of Appeals on November 10, 1908, reversing the judgment of the Circuit Court, setting aside the verdict, and remanding the case to the Circuit Court for further proceedings consistent with the opinion rendered by the Circuit Court of Appeals (see pages 19, 20, 21 of record for opinion and judgment).

The plaintiff in error brings the case to this Court by a writ of error, assigning eleven errors (Record, pp. 22, 23) alleged to have been made by the Circuit Court of Appeals, in its opinion and judgment.

BRIEF OF THE ARGUMENT.

I.

The important question to be considered in this case is — Was George E. Kimball a shareholder in the First National Bank of Chelsea on the date of the suspension of the bank, namely, August 16, 1906?

This question is raised by the assignments of error numbered 2, 3, 4, 5, 7, 8, 9, 10.

Section 5 of the Act of July 12, 1882, is as follows: —

> "That when any national banking association has amended its articles of association as provided in this act and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said Committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section."

A. If said Kimball complied with the terms of said section 5, he ceased to be a shareholder in said bank on September 5, 1904, when its charter expired.

The record shows (p. 12) that said Kimball did not as-

sent to the amended articles (p. 13), that he seasonably gave a proper notice to the directors (p. 13), that he appointed his member of the committee of appraisal provided for in the statute (p. 13), and gave due notice to the bank of this appointment (p. 13); and that after the bank appointed, as its member of the committee, its own president, who was also a director, and a large shareholder in the bank, said Kimball, in good faith, made all reasonable efforts to bring about the appointment of a third member (p. 13), and engaged an attorney, who endeavored to bring about the appointment of a third member of this committee (p. 13); but that all these efforts were fruitless, and before a third member was appointed the bank failed.

The statute defines the way in which a dissenting shareholder in a national bank may sever his connection with the bank, and cease to be a shareholder therein, at the expiration of the bank's charter. Every step required by the statute was taken by said George E. Kimball (Record, pp. 13, 20), who acted throughout in good faith. Two steps not required of him, but of other persons, namely, the appointment of a third member of the committee, and the appraisal of the shares, were not taken. That could not, however, operate to make said Kimball a shareholder under the extended charter of the bank. The provisions of the statute as to appraisal of the shares are not for the purpose of compelling the shareholder against his will to become, for a time, a shareholder of the bank under the new charter. They are merely for the purpose of liquidating the amount of his claim against the bank. He ceases to be a shareholder when he gives notice of dissent. He then becomes a creditor of the bank. The subsequent proceedings as to the appraisal cannot affect his status.

To hold otherwise would allow a bank to compel all

dissenting shareholders to remain shareholders after the expiration of the time limited by the charter, which was exactly what the statute was designed to prevent.

The trouble here is manifest from the agreed facts. The bank's appointment to this committee was not a fair one. It is clear from all principles of justice and equity that a man who is at one and the same time a director of, a large shareholder in, and the president of a national bank, is not a proper person to appraise the value of stock in his own bank (Record, pp. 13, 20). He is an interested party. That he had reasons for placing obstructions in the way of the appraisal, because he wished to prevent examination of the bank's affairs by an outsider, is a fair inference from the failure of the bank shortly thereafter. This inference was drawn by the Supreme Judicial Court of Massachusetts.

Apsey v. *Whittemore*, 199 Mass. 65, at 68.

It would be inequitable to hold that by improper conduct the representatives of the bank could compel shareholders who did not assent to the extension of the charter, but who desired to withdraw, and who have given notice of their withdrawal, to remain shareholders under the extended charter, and to take the very risk they declined to take.

It has been argued that said Kimball should have brought suit to force the two members of the committee to appoint a third member and to proceed with the appraisal. In the first place, said Kimball did employ an attorney, who was endeavoring to induce the appointment of a third member; and while the attorney was so endeavoring the bank failed. Moreover, said Kimball, in good faith, made all reasonable efforts to bring about the appointment of a third member of the appraisal committee. A fair

inference from this statement in the record is that he had done everything which could be required of him.

B. The certificate of stock is not property, but is merely paper evidence of a right. It stands on the same footing as a deed. The mere surrender or retention of it would not affect the title to the shares any more than the surrender or retention of previous title deeds affects a present title to land. But it was the evidence of his claim as a creditor against the bank, and it would not be reasonable that he should be required to surrender it until he had received payment for his shares, especially in view of the conduct of the bank and its representatives.

II.

The next question arising under the assignments of error is whether the defendant, as representative of the estate of said George E. Kimball, can be held liable as a shareholder by estoppel or in any other way.

A. This question is raised by assignment of error numbered 1.

In *National Bank* v. *Case*, 99 U.S. 628, it is stated that a person who is not a stockholder may yet be liable, by estoppel, as a stockholder, to the creditors of a corporation, if he has placed his name upon the books of the corporation as a stockholder, or, in some cases, if he has permitted his name to remain upon its books after he has ceased to be a stockholder. In the case at bar a necessary element of estoppel is wholly wanting, in that the defendant's testate did not place, or cause to be placed, his name upon the stock ledger of the bank after he had given

notice of his desire to withdraw. Its retention was solely the act of the bank and its officers.

Whitney v. *Butler*, 118 U.S. 655.
Earle v. *Carson*, 188 U.S. 42.

In *Stevens* v. *Follett*, 43 Fed. Rep. 842, and in *Keyzer* v. *Hitz*, 133 U.S. 139, at 149, it was held that, in order that one who is not a shareholder should be liable as a shareholder, he must have done some act ratifying, approving, or acquiescing in the bank's action in having him on the books as a shareholder, or receive some benefit such as would arise from the ownership of such stock. In the case at bar not one of these acts was done by the defendant's testate. Indeed, he went further than merely not ratifying, approving, acquiescing in, or receiving benefits, and when the bank sent him a dividend check, refused to receive it and returned it at once with the express statement that he was not a shareholder in the bank (Record, pp. 13, 20).

The question which is now before this Court was recently considered by the Supreme Judicial Court of Massachusetts, in the case of *Apsey, Receiver*, v. *Whittemore*, 199 Mass. 65. The facts in that case are identical with those before this Court in the case at bar. The bank under consideration is the same; it is the same assessment that was called by the Comptroller, and the same appraiser, Hinckley, was appointed by the bank. At page 68 the Court says, —

> "We think that the defendant cannot and should not be held liable as a stockholder at the time when the assessment was levied."

It is a general principle of law that one who may profit by the gains of an enterprise should bear its losses, and that the statute imposing a liability on shareholders in a national bank rests on this principle.

Beals v. *Essex Savings Bank*, 67 Fed. Rep. 816.

Said Kimball could not have profited by the gains of the bank made at any time since the expiration of its charter, and was at no time since such expiration a shareholder in that bank.

B. The books of the bank are not conclusive as to who are shareholders.

In a number of cases it has been held by this Court that where a transfer of stock has been made in good faith and not collusively, and the certificate has been delivered to the proper bank official, with a power of attorney signed by the transferor of the stock, authorizing the transfer, and the bank officials have neglected to make the transfer, the party in whose name the stock stands on the books has ceased to be a stockholder.

Earle v. *Cannon*, 188 U.S. 42.
Whitney v. *Butler*, 118 U.S. 655.
Matteson v. *Dent*, 176 U.S. 521.

In the case at bar, said Kimball had done every act which was required or could reasonably have been expected of him, and it was through the neglect of the bank's officials that he was made to appear as a shareholder. Such neglect or failure of duty on the part of the bank cannot make him a shareholder.

A transfer of bank stock to a person without his knowledge or consent does not make him a shareholder.

Keyzer v. *Hitz*, 133 U.S. 139, 149.

So, a transfer fraudulently or collusively made to avoid paying an assessment will be disregarded, and the real owner, not the book owner, held liable.

Rankin v. *Fidelity Trust Co.*, 189 U.S. 242, 246.

The real owner of shares is held responsible, although the shares are not registered in his name. The law looks through subterfuges and apparent ownerships and fastens the liability upon the persons to whom the shares actually belong.

Ohio Valley National Bank v. *Hulitt*, 204 U.S. 162, 168.

In the last case cited it is stated that a mistake or error in keeping the official list of shareholders would not prevent the creditors from holding liable all who were in fact the real owners of stock in national banks.

In the case at bar, the retention of the name of said Kimball on the bank's list of shareholders was either a mistake or a neglect of duty, and such retention could not make the defendant liable as a shareholder.

III.

The remaining assignments of error numbered 6 and 11 are general, and all the previous discussion applies to them as well.

A. Protection of creditors and public policy.

It may be pertinent, as bearing on the questions of public policy and assignments of error 8 and 9, to consider the provisions for the protection of creditors under the Act of July 12, 1882.

But for this amendment to the National Banking Act, all national banks would have gone out of existence at the expiration of twenty years from their establishment. This amendment provides a way for their extension, but it is evident that Congress had no intention of compelling any shareholder to remain such after the twenty-year period of succession had expired. The holders of at least two thirds of the capital stock must consent in writing to the extension, and any shareholder may cease to be such by complying with the provisions of section 5, as did the defendant.

It has been argued that if said Kimball was not a shareholder under the extended charter, the creditors are likely to suffer, and that it is the intention of the National Banking Act that there shall always be somebody to respond for every share of stock in case of the bank's failure. But when the bank enters upon an extension of its existence under this Act of 1882, the Act contemplates and provides for a change in its shareholders, and provides a method for shareholders in the old institution to cease to be shareholders, and if there are any dissenting shareholders there must necessarily be a time at which there is no holder of certain shares to respond to an assessment.

The security of creditors, including depositors, is provided for in two ways: First, at least two thirds of the shareholders in the bank must, in writing, consent to the extension, and thereby become shareholders in the extended bank; and second, there must be a special examination of

the bank made under the direction of the Comptroller. Unless the bank is found to be in a satisfactory condition the Comptroller does not give his approval to the proposed extension, and the bank must be liquidated as of the date of expiration of its charter, and all shareholders as of that date are, of course, assessable. But when a special examination of the affairs of the bank has been made, and at least two thirds of the shareholders in the bank have consented to the extension, the law contemplates that creditors are sufficiently secured, and allows dissenting shareholders to drop out. The value of their stock is ascertained later and paid them by the bank, and such shares are sold at public auction. But as long as they have complied with the provisions of section 5 of the Act of July 12, 1882, and have not acquiesced in the extension of the charter, they cease to be shareholders simultaneously with the expiration of the bank's charter.

Said George E. Kimball was not a shareholder in the First National Bank of Chelsea at the time of its suspension, nor was he at that time estopped to deny that he was a shareholder; and the judgment of the Circuit Court of Appeals was correct.

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